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SUPREME COURT, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

v.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. ON THE MERITS

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STATEMENT OF THE CASE

Except for a minor error in saying that petitioner was injured on March 9th, instead of March 17th, (Pleadings and R. 56), the case has been correctly stated in the opinion of the Oregon Supreme Court, 158 Pac. (2d) 275; 1945 A.M.C. 517. (Petitioner's statement makes the same mistake as to date). The

case has also been correctly stated in our brief, already filed, opposing the petition. Therefore we make no further statement now except to criticize and disagree with petitioner's statement in the following particulars: His petition says on P. 3, that: "Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would have been clearly liable in such a case, but relied principally upon the terms of the General Agency Agreement." Of course we relied on the General Agency Agreement. But the rest of that statement is incorrect. The whole effect of the evidence was that the entire shipping of the United States, and employment of crews, had undergone a vital change, namely, one from private operation under peacetime conditions to government operation under war conditions.

We also criticize, although we do not regard it as very important, the statement on Page 2 that "the company and unions continued to negotiate for the settlement of disputes. R. 103." It does not appear from the testimony referred to that there ever were any disputes. But if there had been, any action with respect thereto, taken by respondent, would, of course, have been in its capacity as agent, and as it was bound to do in pursuance of its duty to "procure and make available" crews for engagement by the Master. (G.A. Agreement, Article 3A(d)).

In this connection it is well to observe that any changes in the Collective Bargaining Agreements were to be made, *not* by the agents, but "by mutual agreement between the War Shipping Administration and the unions." R. 165, 172.

No further statement need be made now. The issues are:

1. Was petitioner Hust, an employee of the respondent, entitling him to sue the respondent under the Jones Act, or was he an employee of the War Shipping Administration? And,

2. Was any negligence shown on the part of the respondent?

ARGUMENT

In its former brief, opposing the petition for the writ, respondent contended that this case presented no Federal question of substance. Since this Court, by issuing the writ, has now decided otherwise, that part of the former brief has become moot. It therefore seems proper to present this brief on the merits, in which, conceding that a Federal question is involved, we shall confine our argument to showing that the Oregon Court decided that question correctly. Necessarily, however, this brief will have to repeat much that was said in the former, since it, like the former, will have to discuss the evidence. While adhering to the views expressed in the former brief,

(which was concise perhaps to the extreme point of brevity), we shall, now that the case will be heard upon the merits, expand those views further and in more detail.

PETITIONER WAS NOT AN EMPLOYEE OF RESPONDENT AND THEREFORE CAN NOT SUE RESPONDENT UNDER THE JONES ACT (46 U.S.C.A., Section 668)

The Jones Act

Under this Act, the employer-employee relationship is a prerequisite to the suit. Without it the plaintiff must fail. And the relationship must be the "conventional", "natural" one as commonly understood.

Robinson v. Baltimore Ohio R. R. Co., 237 U.S. 84.
Hull v. Philadelphia Reading Ry. Co., 252 U.S. 475.
Panama R. R. Co. v. Johnson, 264 U.S. 375.
The Norland, 101 F. (2d) 967.
Nolan v. General Seafoods Corp., 112 F. (2d) 515.

Under the "Service Agreement" the Respondent Was a Mere Limited Agent; Not an Employer

As everyone knows, the United States, through the United States Maritime Commission and the War Shipping Administration, in the prosecution of the war, requisitioned the ships of private owners, and built a huge fleet of its own. Various devices for the

operation of all these vessels were tried or suggested, as e.g., the bareboat charter agreements mentioned in Article 20 of the present Service Agreement, but the method finally adopted was to have the War Shipping Administration operate the vessels itself, but assign them to General Agents, under a "Service Agreement" to attend to the "business" of the vessel. (Def. Ex. 21, R. 149; offered at 116). That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case, and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel. That agreement was prepared by the War Shipping Administration and not by this respondent. Petitioner concedes that it is carefully drafted, (Brief, P. 34). The language throughout is carefully guarded to show that the agent's duties are confined to the "business" of the vessel and not to its physical operation. The keynote is struck in the very first Article: "The United States appoints the General Agent as its *agent* and *not as an independent contractor,* to manage and conduct the *business* of vessels assigned to it by the United States from time to time". (Throughout this brief italics are ours unless otherwise indicated).

In Article 2 the General Agent accepts the appointment: "The General Agent accepts the appointment and undertakes and promises so to manage and conduct the *business* for the United States, in accord-

ance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose."

All the rest of the agreement is merely a detail or itemization of the "business" of the vessel and of the agent's duties in managing and conducting it. And we interject here, and may advert to it later, that there is not a single word in the whole agreement that indicates that the agent is to be the physical operator of the ship.

Article 3 is: "To the best of its ability, the General Agent shall *for the account of the United States:*

"(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices."

Counsel has seized on the word "maintain". Of course here it merely means that the vessel shall be placed or used in whatever trade or service the United States directs.

Article 3A (b) is that the agent shall, for the account of the United States: "Collect all moneys due

the United States under this agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents." Article 3A (c) is that the General Agent shall, for the account of the United States: "Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". Note that the very vital and significant word "man" is left out. The usual phrase in charters or shipping agreements is that one party or the other shall "*man*, equip and supply"; or, in charter parties, it is said that the vessel being "well and sufficiently *manned*, equipped and supplied and in all respects seaworthy", etc. The omission of that word here is deliberate, and is in accord with the next paragraph, which indicates quite clearly that the War Shipping Administration is to man the ships. Before we come to that next paragraph, however, we do not fail to notice the word "maintain" the vessels, for counsel has seized upon it. It has no importance in this case because this particular vessel *was* maintained; and maintenance has no bearing on the question of employment anyway. But it is further to be noted that the agent's duty is merely, to the best of its ability, "maintain the vessels, subject to regulations, instructions or methods of supervision and in-

spection as the United States may from time to time prescribe." And this is to be read in connection with Article 14, which says that the agent "shall *arrange* for the repair of the vessels", but always "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States". And the testimony of Mr. Tripp in this case, which was uncontradicted, shows that in reality all this business of maintenance and repair was taken over and done by the War Shipping Administration itself. R. p. 124, 125.

But to return to the important subject of manning, we have noticed its omission from the equipping, victualing and supplying section, where naturally it would appear if the agent were to do it, and we come now to Article 3A (d), where the thing is made clear beyond peradventure. This is it:

"The General Agent shall *procure* the Master of the vessels operated hereunder, subject to the approval of the United States. *The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall *procure* and *make available* to the *Master* for *engagement by him the officers and men required by him to fill the complement of the vessel.* Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary prac-

tices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. *The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.*"

As we have said before, this Service Agreement was prepared by the War Shipping Administration and was carefully drawn, and we do not see how the English language could make any plainer the fact that the crew of the ship is employed by the War Shipping Administration and not by the agent. The steps are in clear and logical sequence,

1. The master is the "agent and employee of the United States";
2. The crew is made available to the master "for *engagement* by him";
3. The officers and members of the crew are "subject only to the orders of the master"; and
4. All such persons are paid "with funds provided by the United States hereunder".

We do not intend to go through the whole Service Agreement and dissect it clause by clause. It is too long. But we remark that if there were, in subsequent clauses, any inferences, as counsel would have us believe, that the respondent was the employer of

petitioner, those inferences would have to give way to the clear and explicit provisions of Article 3A (d). There are, however, no such inferences. The whole agreement adheres consistently to the idea that the agent shall attend only to the "business" of the vessel, and not to its manning or physical operation or control.

Article 3A (e) refers to bills of lading. It may be noted that the last sentence thereof says that such bills may provide "that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof", which is merely a further indication that the General Agent was not physically operating the ship.

Article 3B is immaterial. So are Articles 4, 5 and 6. Article 7 provides that the United States shall reimburse the General Agent for the moneys which the General Agent shall disburse for the Government, including, be it noted, wages.

Article 8 relates to insurance, and we shall have more to say of it later when we comment on one of petitioner's contentions.

Article 9 relates to general average and says, as indeed the agreement does throughout, that the agent in all respects shall comply with the instructions of the United States.

Article 10 relates to salvage, and gives the United States complete control over salvage claims and

awards. This is interesting because it is usual for the owner of a salving vessel to include in his claim against the other vessel the claims of his own crew. In other words, he looks after his own crew. If the agent were the employer of the crew, as counsel contends, the natural thing would be for the agent to look after its salvage claims.

Arficle 11, 12 and 13 are unimportant.

Article 14 relates to repairs and maintenance. Note that it does not say that the General Agent shall repair the vessels or maintain them. It only says that the agent shall, unless otherwise instructed, "arrange for" the repair, etc., "subject to such regulations, instructions or methods of supervision and inspection as may be prescribed by the United States", and shall cooperate with the United States in making inspections or investigations, etc.

Article 15 is not important.

Article 16 says that the United States shall indemnify and hold harmless the agent against claims for injury to persons or property.

Counsel seizes on this to say: "How could there be a crew claim against the agent unless the agent were the crew's employer?" This is a non sequitur. A defendant in a tort action is not always the employer. But passing that, the very existence of this suit shows the propriety of the agent having indemnification.

In this connection it may be noted that the Agents, as a war-time service, threw themselves wholeheartedly into the job of attending to the business of these ships for the War Shipping Administration, and did it *without any assurance of their compensation.* They left their compensation wholly to the discretion of the War Shipping Administration. "Article 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine."

It was certainly no more than right under these circumstances that the agent should be indemnified against all claims of every possible kind.

The remaining articles of the agreement are immaterial here.

In view of Counsel's persistent claim that respondent was the "operator" of the ship,—as e.g., "The most important single issue in this case is whether respondent company was the operator of the ship", (Brief, P. 28),—we call attention again to the fact that nowhere in the whole agreement is the agent referred to as "the operator". In fact that word nowhere appears. It would not, however, be very important if it did; for it is a word very loosely used in the shipping world and can mean anything from an outright owner to a subagent. It is true that some-

times the agreement refers to the ships "operated hereunder"; but that can mean operated by the War Shipping Administration as well as operated by the agent, and in view of the clear terms of the agreement limiting the agent's duties to that of the "business" of the vessel, it is clear that the physical control of the ship and the employment of her crews were not in the agent. If they were intended to be, why did not this "carefully drafted" agreement say so?

The same may be asked in reference to counsel's suggestion that the master and the crew may have been jointly employed by both the War Shipping Administration and the agent. Again we ask: "Why does not the agreement say so, or even intimate it?"

That the business of the vessel was the limit of the agent's duties is not only fully evident from the agreement itself, but it is confirmed by the War Shipping Administration's General Order 21 (Defendant's Exhibit 27, R. 174, offered at R. 131), which reads as follows:

> "§306.3 *General agents defined.* A general agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA-4-4-42), appoints agents as directed by the War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel."

The "Statement of Policy"

It is immaterial whether petitioner Hust knew of the terms of the Service Agreement or not. For, as said in *Murray v. American Export Lines,* 53 Fed. Supp. 861, 863, while the rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts, "nevertheless the contract between principal and agent may show who is in control of the operation of the vessel, whose orders the members of the crew are required to obey and who is their employer". And as said even more explicitly in *Steele v. American South African Line,* 62 Fed. Supp. 636, 638: "I cannot see how a cause of action specifically created by statute can be maintained against any party, other than the party statutorily charged with liability. Unawareness of the identity of the employer, at the time of signing on the vessel, is not, in my opinion, legally sufficient to fasten statutory liability upon a party not made responsible by the terms of the statute." i.e., the Jones Act. (Same case reported in 1945 A.M.C. 1505.)

But as a matter of fact full knowledge of the agreement, and particularly of the important paragraph 3A (d) relating to employment, must be imputed to Hust. For both the Service Agreement and General Order 21, limiting the agent's duties to the "business" of the vessel, were published in the "Federal Register", and under the law constituted notice

to all the world, including Hust.

Far more important than this, the decisive paragraph 3A (d), relating to crew employment, was the subject of special consideration between the War Shipping Administration and the maritime unions, and was expressly agreed to in writing by them. This writing is known as the "Statement of Policy". (Def. Exhibit 25, R. 164-168, offered at R. 130). There are several of these Statements of Policy, one for each of the maritime unions, but all are practically identical. The one relating to petitioner Hust's union (Pacific Coast Seamen, Firemen and Cooks and Stewards) begins at R. 167. Each of these Statements of Policy quotes in full the important paragraph 3A (d) in which:

1. The Master is designated as the "agent and employee of the United States", with "full control" over the navigation and management of the vessel;
2. The master shall *engage* the crew;
3. The crew shall be subject *only* to his orders; and
4. Shall be paid with funds provided by the United States.

Thus Hust's own collective bargaining agent not only knew of this feature of the Service Agreement, but actually agreed to it in writing. Indeed the in-

ternal evidence suggests that these Statements of Policy and Paragraph 3A (d) of the Service Agreement were not merely agreed to by the unions, but were actually insisted upon by them, to insure that crews would be procured through their union halls, and not otherwise.

If there is anything at all to collective bargaining, and of course there is, since it is the order of the day, knowledge of the Service Agreement, and especially 3A (d) must be imputed to Hust as much as if he had signed it himself. We repeat, however, that such knowledge was not essential. The status of the agent was fixed whether Hust knew it or not.

Counsel, in their brief in reply to the one we filed in opposition to the petition, refer, at Page 12, to this Statement of Policy as a "masterpiece of legal equivocation". We do not think it is. But it is enough to say that, like the Service Agreement, it was prepared by counsel for the War Shipping Administration and not by this respondent, who was not even a party to it. Moreover, it was signed by the unions who, as everyone knows, do not lack able counsel.

By the "Shipping Articles" Hust Became an Employee of the United States

Consistent with the foregoing plan that the master was to "engage" the crew from men made "available" to him by the agent, the master of the SS "Mark Hanna" did so engage the crew for that ship, and,

among them, petitioner Hust. This contract of hiring or "engagement" was, as required by law, in the form of "Shipping Articles", entered into between the master and the crew, including Hust, in the presence of the Deputy Shipping Commissioner. These Articles are in evidence as plaintiff's Exhibit 13 (R. 142 and 143, and were offered at R. 92). The pertinent part reads:

> "IT IS AGREED between the Master and seamen, or mariners, of the S. S. 'MARK HANNA' of Portland, Oregon, of which Henry Hoeppner is at present Master, or whoever shall go for Master, now bound from the Port of Portland, Oregon, to a point in the Pacific Ocean to the westward of Vancouver, Washington, and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency thereof and back to a final port of discharge on the Pacific Coast in the United States to be designated by the Master, for a term of time not exceeding Twelve (12) calendar months."

Then follow the usual printed provisions; then a rider subjecting the Articles to the Maritime War Emergency Board's Decisions; with the Master's signature appearing at R. 142, and Hust's at R. 143, where the "Particulars of Engagement" are further stated. (The sheets containing the Particulars of Engagement for other departments of the crew have been, by stipulation, omitted). Four things should be especially noted in these Articles:

1. They are between the Master (and *not* the General Agent) and the crew.

2. The voyage is to be anywhere that "the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency thereof".

3. The rider reads as follows:

> "It is also agreed that bonus areas, bonus payments, insurance, reimbursements for lost personal effects, wages during internment, and repatriation coverages for all licensed and unlicensed personnel shall be governed by the Maritime War Emergency Board Decisions Nos. 1, 2, 3, 5, 7 & 8, with supplements, amendments, revisions, clarifications, corrections and attachments, and such subsequent decisions as may be applicable to the present voyage."

As said of a similar rider in *Williams v. American Foreign SS Corp.*, 1946 A.M.C. 98, 100:

> "It certainly cannot be considered that the Maritime War Emergency Board is an agency or arm of the defendant. The court will take judicial notice of the fact that it is a governmental agency."

4. Near the head of the Articles, below the name of the ship, "Mark Hanna", and in the "block" provided for that purpose, are these words:

> "War Shipping Administration (Owner) Washington, D. C.
> Moore-McCormack Lines, Inc. (General Agents) 5 Broadway, New York, N. Y."

Thus affording clear notice to Hust when he signed the Articles that respondent Moore-McCormack Lines, Inc., was not the owner, but only an agent.

The logical conclusion from all this—the Service Agreement, the Statement of Policy and the Shipping Articles—is that the master "as an agent and employee of the United States", "engaged" the crew on behalf of the owner of the vessel, the United States, which retained full control of the vessel, directed her voyages, etc., and that Hust was an employee of the United States and not of the General Agent, Moore-McCormack Lines, Inc. There is no escape from this conclusion. It is, moreover, entirely confirmed by the language of Public Law 17, to which we shall advert later. But in the meantime we call attention to the decisions of the lower courts.

DECISIONS OF THE LOWER COURTS

A majority of the lower courts have held, with us, that General Agents under this Service Agreement are not employers of the crews. Some have held otherwise, apparently influenced by this Court's decision in *Brady v. Roosevelt Steamship Co.;* as to which we cannot avoid the feeling that one reason why this Court has granted Hust's petition for the writ is to afford an opportunity to correct the misinterpretations that have been placed upon that case.

Following are the cases which have decided this

question in accordance with our contentions:

Hust v. Moore-McCormack Lines, Inc., 158 Pac., (2d) 275 (The present case).

Murray v. American Export Lines, 53 F. Supp. 861 (U. S. District Court, S. D., N. Y.).

Lewis v. U. S. Nav. Co., 57 F. Supp. 652, (U. S. District Court, S. D., N. Y.) (Decided, however, against the agent on another ground).

Walsh's Case, 1945 A.M.C. 747, 749, (U. S. District Court, S. D., N. Y.).

Ferris v. American South African Line, 1945 A.M.C. 1296, 1300 (U. S. District Court, S. D., N. Y.).

Williams v. American Foreign SS Corp., 1946 A.M.C. 98, (U. S. District Court, S. D., N. Y.).

Conlon v. Hammond Shipping Co., 55 F. Supp. 635, (U. S. District Court, N. D., Cal.).

Baker v. Moore-McCormack Lines, Inc., 57 F. Supp. 207, (U. S. District Court, N. D., Cal.).

Steele v. American South African Line, 1945 A.M.C. 1505; 62 F. Supp. Adv. Sheets 636, (U. S. District Court, N. D., Cal.).

McInnis v. U. S. of America and General SS Corp., 1945 A.M.C. 1039, (U. S. District Court, S. D., Cal.).

Fox v. Alcoa SS Co., 143 Fed. (2d) 667, (C.C.A., 5th Circuit), where it was conceded that there was no good claim against the agent.

Neilsen v. American President Lines, 1944 A.M.C. 1169, (New York Supreme Court, N. Y. County).

Pedersen v. Stockard SS Corp., 1945 A.M.C. 23, (New York Supreme Court, Appellate Division).

Algiere v. Cosmopolitan Shipping Co., 1945 A.M.C. 906, (New York Supreme Court, Appellate Term).

All of the foregoing cases consider the identical Service Agreement involved in the present case, and hold flatly that under it the seaman is not the employee of the agent.

We do not, of course, intend to quote from all the foregoing cases. That would be too long. Nor shall we quote from the Oregon case, since it is the one under review. But we shall quote from two others because they illustrate the general tenor of them all, and because they state clearly and succinctly the position taken by us.

In *Baker v. Moore-McCormack Lines, supra,* Judge Roche, in the Northern District of California, said:—

> "Pursuant to the 'Service Agreement' between the United States and Moore-McCormack Lines, Inc., the defendant was the general agent of the United States with respect to the vessel. Murray v. American Export Lines, Inc., D. C. S. D. N. Y., 53 F. Supp. 861, 1943 A.M.C. 1426. As such agent of the United States, the defendant is suable for its own torts. Brady v. Roosevelt SS Co., Inc., 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471. However, a seaman's action under the Jones Act may be maintained only against the seaman's employer. Panama R. R. Co. v. Johnson, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Kwasizur v. Dawnic S. S. Co., D.C. Penn., 25 F. Supp. 327; Gardiner v. Agwilines, D.C.N.Y., 29 F. Supp. 348; The New Brooklyn, D.C. Mass., 37 F. Supp. 955; Eggleston v. Republic Steel Corp., D.C.N.Y., 47 F. Supp. 658.
>
> "If plaintiff wishes to follow the Jones Act against his employer, the United States, he may do so under certain conditions pursuant to the

provisions of the Suits in Admiralty Act, 46 U.S.C.A. §741 et seq., and by virtue of Public Law 17, 50 U.S.C.A. Appendix §1291, irrespective of whether the vessel is a merchant vessel or a public vessel. However, the suit against defendant Moore-McCormack Lines, Inc., cannot be under the Jones Act, inasmuch as the defendant did not man the vessel and was not plaintiff's employer. . . . ." 57 F. Supp., at Page 208.

In *Steele v. American South African Line, supra*, which arose on a motion to remand to the state court, Judge Goodman, in the Northern District of California, said:—

"It is first urged that, in fact, defendant and not the United States was plaintiff's employer. However, by the 'Service Agreement' between the defendant and the United States War Shipping Administration, the United States and not defendant was plaintiff's employer. See my decision in Conlon v. Hammond Shipping Co., Ltd., D.C., 55 F. Supp. 635; Murray v. American Export Lines, Inc., D.C. 53 F. Supp. 861; Baker v. Moore-McCormack Lines., D.C. 57 F. Supp. 207 (decision of Judge Roche)."

(Here follows a discussion of Lewis v. U. S. Nav. Co., supra. The opinion is unable to agree with that case and holds, on the contrary, that: "Unawareness of the identity of the employer at the time of signing on the vessel, is not, in my opinion, legally sufficient to fasten statutory liability upon a party not made responsible by the terms of the statute".)

"Plaintiff suffers no prejudice nor loss of substantial rights. He may maintain his cause against the United States, his employer, by virtue of Public Law 17, 78th Congress, 50 U.S.C.A. Appendix §1291, as if he were proceeding under the

Jones Act. He also has the right to maintain an action against defendant for damages for maritime tort. See Brady v. Roosevelt S.S. Co., 317 U.S. 575, 63 S. Ct. 425, 87 L. Ed. 471." 62 F. Supp. Adv. Sheets, pp. 637-638. Also 1945 A.M.C., pp. 1506-1508.

From this review of all the cases it is quite apparent that the decided weight of authority, both in the number of decisions and in the rank of the courts, is in favor of our position that Hust was not an employee of this respondent and cannot sue it under the Jones Act.

Against the fourteen cases which support us, counsel, on Page 11 of his brief, cites five. Only two are in a Federal Court, and it is the same court in both,—the U. S. District Court, Eastern District, Pennsylvania. The other three are in inferior state or city courts.

Those five cases are:

McCormick v. Moore-McCormack Lines, 54 F. Supp. 399, (U. S. District Court, E. D. Pa.);
Bast v. American-Hawaiian SS Co., 1945 A.M.C. 503, (U. S. District Court, E. D. Pa., merely follows the former case without discussion);
Gay v. Pope & Talbot, Inc., 1944 A.M.C. 855 (New York Supreme Court, Special Term);
Shaller v. Matson Nav. Co., 1943 A.M.C. 839; and
Moss v. Alaska Packers Ass'n., 1945 A.M.C. 493.

(Counsel also says "See also" *Carroll v. United States*, 133 Fed. (2d) 690, and *Lewis v. U. S. Naviga-*

tion Co., 57 Fed. Supp. 652. A glance at the Carroll case will show that it has no bearing on ours; and the Lewis case is in our favor.)

To return to counsel's five cases:

1. The McCormick case, supra, was a motion for summary judgment. The Agency Agreement is not discussed. The decision, in our opinion, is based on a misinterpretation of the Brady case.

2. The Bast case, supra, also a motion for summary judgment, being in the same court, merely follows the McCormick case without discussion.

3. Gay v. Pope and Talbot, supra, was in the N. Y. Supreme Court. It was a motion to dismiss. The only question was whether Public Law 17, 78th Congress, First Session, provided an "exclusive remedy", and "superseded" the Brady case. The opinion in its final paragraphs recognizes the propriety of the decision in Murray v. American Export Lines, supra, which supports us throughout. Any implications that a seaman can sue the Agent under the Jones Act are entirely overthrown by the three *later* decisions, in this *same* court, that he cannot. We refer to the Neilsen, Pedersen and Algiere cases, supra, cited in the list supporting us.

4. Shaller v. Matson Nav. Co. hardly deserves notice. It was a motion to dismiss in the "City Court of the City of New York". The defendant

was the owner of the vessel, and what kind of an Agency Agreement it had does not appear.

5. Moss v. Alaska Packers Ass'n., supra, was an appeal to the Superior Court of California from the Municipal Court of San Francisco. It was a suit for wages, transportation, maintenance and cure—not a suit for damages. It was not under the Jones Act. The implications therein that plaintiff was an employee of the Agent are, in our opinion, untenable, and the reference to the Brady case, mistaken.

From the foregoing collection of the authorities—both for and against—it is plain that the statement on Page 11 of petitioner's brief that "the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from in this case," is in error. On the contrary, it is evident that the great weight of opinion is in favor of our position that under this Service Agreement, the Agent is *not* the employer and cannot be sued under the Jones Act.

PUBLIC LAW 17, 78TH CONGRESS, FIRST SESSION
U.S.C.A. Title 50, App. §1291

Petitioner Hust was hurt on March 17th, 1943. R. 56. Public Law 17, known as the "Clarification Act", was approved 7 days later, March 24, 1943, and was therefore not in effect at the time of the injury. It

nevertheless throws an illuminating light on how Congress and the War Shipping Administration regarded these seamen, and fixes upon them clearly the status of employees of the United States.

Before considering Public Law 17, it may be well to review briefly what the law was before that act was passed. Ever since *Panama R. R. Co. v. Johnson*, 264 U. S. 375; 68 L. Ed. 748, it has been the law that the Jones Act was applicable to suits in admiralty as well as to actions at law. Therefore any seaman employed on a merchant vessel of the United States had a right to sue the United States under the Suits in Admiralty Act, and in such suit all the substantive rights of the Jones Act applied. Such was Hust's case. Irrespective of Public Law 17 and its retroactive provisions, he could have sued the United States under the Suits in Admiralty Act, and he could have had all the substantive rights of the Jones Act, providing, of course, that the "Mark Hanna" was a merchant vessel. (And there is nothing in the record to show that she was not.)

There was, however, apparently some doubt as to whether such a seaman could sue if he were injured on a "public vessel". There was also the necessity (to prevent double indemnity) to take these seamen out of the provisions of the United States Employees' Compensation Act, the Civil Service Retirement Act, etc., since they had, and were to retain, all the substantive *rights* (but not the *remedy*) of privately em-

ployed seamen, including those of the Jones Act. A further reason for passage of the Clarification Act was that the War Shipping Administration, faced with thousands of claims for injuries on the huge fleet it was operating, wanted an opportunity to settle these claims amicably out of court before suit was begun. This was also to the advantage of the seamen. Hence the provision that no suit could be begun until the claim was "administratively disallowed".

With these preliminary remarks, let us turn to the statute itself. It is full of explicit references to these seamen as employees of the United States. For example,—

> "Sec. 1. That (a) officers and members of crews (hereinafter referred to as 'seamen') *employed on United States* or foreign flag *vessels as employees of the United States through the War Shipping Administration* shall with respect to . . . . . (2) death, injuries, illness, ... have all of the rights, benefits, exemptions, privileges and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

The rest of the act is full of such terms as "officer or member of the crew as an employe of the United States, employed through the War Shipping Adminis-

tration", (Section 1 (b), subsection (i), relating to taxes on wages); and the same phrase is repeated in Section 1 (b) (o), relating to social security taxes, and the Administrator is referred to as "such Administrator as an employer", etc. The House Report accompanying this legislation, which will be found in 1943 A.M.C., commencing at Page 606, is comprehensive and clear and makes it abundantly plain that these seamen are employees of the United States through the War Shipping Administration; that they have the substantive rights of the Jones Act, but to be enforced under the Suits in Admiralty Act. For example, thus, at 1943 A.M.C., Page 606: "The effect of Section 1 is to provide that officers and crew members who are employed on behalf of the United States through the War Shipping Administration shall be put on the same basis as seamen in private employment with respect to rights, benefits and privileges in connection with employment, particularly in case of death, injury or other casualty. Under the bill, these employees of the War Shipping Administration will have the seaman's rights to wages, maintenance and cure, in case of illness or injury in the ship's service They will have the benefits of the Public Health Service, including marine hospitals, like other seamen. They will have old-age and survivors' insurance under the Social Security Act. They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they

(and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. *Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act* except that claims with respect to social-security benefits shall be prosecuted in accordance with the procedure provided in the social-security law. . . . ."

The report is much too long to quote, or from which to take many excerpts, but this, on Page 623, is illustrative of the whole thing:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these *substantive rights* would be governed by existing law relating to *privately* employed seamen. The only modification thereof arises from the *remedial* provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States."

Petitioner in his brief, it seems to us, has continually confused rights and remedies when he points to the fact that Public Law 17 and the Report both speak of the seaman having the same *rights* as private seamen. He always overlooks the fact that both the statute and the Report immediately couple this by saying that the *remedy* shall be under the Suits in Admiralty Act. Thus, on Page 625 of the A.M.C. it

is said:

> "Seamen covered by section 1 being entitled thereunder to the *rights* provided under the Jones Act and the general maritime law and to the *remedies* under the Suits in Admiralty Act, would be expressly excluded from the benefits which otherwise would accrue to them as employees of the United States under the United States Employees' Compensation Act. This provision carries out the basic policy of section 1 under which seamen employed through the War Shipping Administration, though technically Government employees, have their rights determined as if they were in private employment under the applicable statutes and law. This is in conformity with the views and desires of seamen in general as expressed through their representatives."

We have quoted this passage also for another reason. It contains the phrase "though technically government employees". Counsel, on Page 53 of their brief, have seized on this phrase to claim that these seamen are only technically government employees, and not really such under the Jones Act. But the context of the passage shows quite clearly that all the writer meant was that these seamen, although given all the rights which we have discussed, were also "technically government employees" under the United States Employees' Compensation Act, and would get those benefits too unless excluded.

On Page 55 of counsel's brief they quote from the Senate Report, and it is a good example of how a wrong emphasis can infer a wrong meaning. Here is the way they have it:

"Inasmuch as seamen covered by section 1 will be entitled to the rights provided under the Jones Act and general maritime law *and* to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act." (their emphasis)

We submit that if any emphasis is to be supplied, it is to be like this:

"Inasmuch as seamen covered by Section 1 will be entitled to the *rights* provided under the Jones Act and general maritime law, and to the *remedies* under the Suits in Admiralty Act." etc.

We call attention to one more feature of the House Report, before leaving it. The purpose of our reference is to show that the House Committee was quite familiar with the "Service Agreement", the "Statement of Policy", and the Collective Bargaining agreements, and, being thus fully cognizant of the whole method of employment as practiced in this case, recognized that the seamen were employed by the War Shipping Administration. Here is what the Report says, 1943 A.M.C. 617:—

"The vessels owned by the War Shipping Administration or under bareboat charter to it are operated by experienced steamship companies as general agents for the Administrator. (Note the loose use of the word 'operated', as we have remarked earlier in this brief.) The agreements between the Administrator and the general agents specifically provide that the general agent shall

procure and make available officers and crews for War Shipping Administration vessels 'through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.'

"The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he specifically provided that 'the provisions of the existing collective bargaining agreements be continued and observed unless changed by mutual agreement.' Accordingly, the seamen *employed by the War Shipping Administration through its general agents* are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, alty (sic) provisions, and so forth. By this means, there have been pre-alty (sic) provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. *Although employees of the Government*, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payment having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or

from advances made by the Administrator."

Certainly this can leave no doubt of what the House, through its Committee, thought of the matter.

THE INTERNAL REVENUE CODE

As a further evidence of legislative intent, we refer briefly to §1621 of the Internal Revenue Code, (U.S.C.A. Title 26 Appendix). It says, in part:

> "For the purpose of paragraph (8) (which refers to services outside the United States) services performed on or in connection with any vessel *as an employee of the United States employed through the War Shipping Administration* shall not constitute services performed outside the United States."

REMARKS UPON PETITIONER'S BRIEF

As most of these remarks pertain to the question of employment, we make them at this place, deferring to later pages the discussion of our second point,—that no proof of respondent's negligence was shown.

The Brady Case

Counsel relies strongly on this case. We have never understood why. It is different from the present case in almost every respect. It was not under the Jones Act. The man was not an employee, but was a customs inspector boarding the ship. The Agency Agreement required the agent to "man" the ship, which our present agreement does not. The only ques-

tion was whether the Suits in Admiralty Act gave the General Agent an immunity from its own torts. As Mr. Justice Douglas said: "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent nonsuable for their own torts." 317 U.S., at Page 577. Of course we make no such claim here.

Petitioner's Claim That the Agent Was the "Operator"

At various places throughout Petitioner's Brief, the claim is made that the agent was the "operator", —meaning the physical operator of the vessel,—and the suggestion is made, though it must be confessed somewhat faintly, that it was the agent's duty to maintain the ship even though ten thousand miles away at sea, and that the master and the crew, although employees of the United States were also "agents" of the General Agent for that purpose.

It seems sufficient answer to this to say that neither the Service Agreement nor any of the evidence in the case is susceptible of that construction. If the Service Agreement had intended anything like that why does it not say so? Do the words that the master shall be an "agent and employee of the United States, and shall have "full control" of the vessel, and the crew shall be subject "only" to his orders, mean nothing?

In this connection we may advert to counsel's ref-

erence to the admission in respondent's answer that "at the time of the accident alleged it was operating the liberty ship SS 'Mark Hanna' for and on behalf of the United States of America, represented by the War Shipping Administration, under a written Agency Agreement prescribing and limiting the duties, authority and functions of this defendant." (Petitioner's Brief, P. 48). We have before pointed out the extremely loose use of the words "operates", "operator", etc. They have all shades of meaning. For example Tripp speaks of "the operation of these vessels for the War Shipping Administration", but explains "it is practically all accounting". R. 117. The allegation in the complaint which respondent was answering was "That among said vessels which defendant corporation operates, manages and controls is a vessel generally known as a liberty ship named the SS 'Mark Hanna'." (R. 3). When the respondent answered, *denying* that it employed plaintiff or managed or controlled the ship, but admitting that it operated it in a very limited capacity under a certain written Agency Agreement, it came about as close as the English language could to stating the facts. As Justice Holmes is reported to have once said: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and the time in which it is used." Bearing in mind the limited nature of the admission, and the fact that respondent's answer denied managing or controlling the ship,

(R. 6) and also denied that plaintiff was employed by it, certainly there is here no admission of physical control over the ship or her crew.

National War Labor Board and National Labor Relations Board Cases

It is claimed that two decisions, one by each of these Boards, cited at Pages 38 and 39 of petitioner's brief, show that seamen, like Hust, are employees of the General Agent. We do not know the facts in those cases. It appears from the quotation on Page 38 of petitioner's brief that "*the War Shipping Administration* had directed the steamship companies to negotiate contracts with the unions," etc. But whatever the facts, and whatever the effect of those decisions, they certainly cannot make Hust an employee within the meaning of the Jones Act. The relationship of employer and employee in Labor Board cases is sui generis, as was pointed out by this Court in *N.L.R.B. v. Hearst Publications,* 322 U.S. 111, and has nothing to do with the employer-employee relationship which is a prerequisite to an action under the Jones Act. It was long ago held in cases under the Employers' Liability Act, which of course was incorporated in the Jones Act, and is its foundation, that the employer-employee relationship must be the "conventional", "natural" one. *Robinson v. Baltimore, Ohio R. R. Co.,* 237 U.S. 84; *Hull v. Philadelphia Reading Ry. Co.,* 252 U.S. 475. And in *Panama R. R.*

Co. v. Johnson, supra, this Court said that "The statute (the Jones Act) is concerned with the relative rights and obligations of seamen and their employers, arising out of personal injuries sustained by the former in the course of their employment." The lower courts have, of course, always adhered to this view. *The Norland,* 101 Fed. (2d) 967, 971, and *Nolan v. General Seafoods Corp.,* 112 Fed. (2d) 515, 517, and all the cases heretofore listed in this brief as approving our position. Indeed no question was made of this at the trial.

Collective Bargaining Agreements

These are discussed on Pages 40 to 43, inclusive, of Petitioner's Brief. The gist of his argument is that since these agreements, which were in existence between the unions and the companies before the War Shipping Administration took over, refer to the companies as "employers", and since the War Shipping Administration's Statement of Policy "froze" the agreements, therefore the companies, even when acting in their capacity as agents, were frozen in their status as employers. At least that is the way we understand counsel's argument. It is, however, completely negatived by the pointed inclusion in the "Statements of Policy" of the all-important paragraph 3A(d) of the Service Agreement. Answering the same sort of argument, the Court said, in *Steele v. American South African Line, supra*: "However,

the claimed effect of this (collective bargaining) agreement is greatly weakened if not completely negated by the 'Statement of Policy' executed between Maritime Union officials and the United States War Shipping Administration. . . . ." (This is not in the body of the opinion, but in a note below. Nevertheless, was evidently said by the court). In view of this specific inclusion in the Statement of Policy of paragraph 3A(d), it is, like a good many things in Petitioner's Brief, a little beyond us how counsel can say, as he does on Page 41, that: "There was nothing to indicate that the War Shipping Administration was to be substituted for the companies as the employer under the union contracts. . . . ."

The business agent of the union himself, Mr. Warwick, who testified for petitioner, made it pretty plain what was meant by "freezing the union agreements". It was not the employer status. It was rather the wages and working conditions. He testified:

> "Q. You don't know the exact mechanics that the government went through to freeze these agreements, do you?
>
> "A. Only to the extent that the wages, working conditions, collective bargaining agreements —as far as freezing of the vessels themselves, I don't know. What I am talking about now is the working conditions of the unlicensed personnel. When I am talking about freezing, I am talking about freezing their working conditions, their overtime rates and collective bargaining agreements." (R. 102, 103)

That he was right is readily apparent from the language of the Statements of Policy themselves. It was "Wages and Working Conditions" (R. 167) that were frozen.

We have already pointed out that the collective bargaining agreements were to be continued "unless changed by mutual agreement between the *War Shipping Administration* and the unions." R. 165, 172.

In a word, the War Shipping Administration, as said by the Oregon Supreme Court, "took over the collective bargaining agreements, substituted itself as a party in place of the steamship companies, and the unions acquiesced". Significantly, the House Report, at 1943 A.M.C. 618, speaks of "the adoption of the collective bargaining agreements" by the Administrator.

Payment of Wages

On Page 44 counsel says that the seamen received their wages in cash in envelopes bearing the name of the respondent company; and bonus payments by checks issued by and on the company; and that deductions were made for social security taxes. We cannot see anything to this. The company was merely performing its duties as an agent under the agreement, which required it to pay the crew in the customary manner and be reimbursed by the government. As to the trifle that the pay envelopes bore Moore-McCormack's name, Mr. Tripp testified that they had

a large supply on hand and were using them up as a matter of economy. Counsel is mistaken in saying that the testimony (R. 62) shows that bonus payments were paid by check. It is silent on how they were paid, but it would not make any difference anyway.

Crew-Pass and Muster Cards

Petitioner introduced in evidence a "crew-pass and muster card", (Plff's Exhibit 1), bearing the company's name, without, however, designation as agent or employer. It was signed by the chief mate. It would seem to us to be of no consequence whatever, even if it had been issued by a representative of the company. It was probably like the pay envelopes, merely a bit of accumulated stationery which the company had used formerly in its operations. But at any rate, as the Oregon Court points out, there is no evidence at all that the chief mate—an employee of the War Shipping Administration—had any authority from the company to issue it.

Withholding Tax Forms

On page 45 of their brief, counsel points to the fact that the respondent issued to a fellow crewmember of Hust's a printed U. S. Treasury Withholding Tax Form, on which the company's name appears under the words: "Employer by whom paid". Of course. The Internal Revenue Code requires the

person paying the wage to withhold it even though he is not the employer. He is simply called the employer for the particular purposes of that statute. Section 1621 of the Internal Revenue Code, Title 26 U.S.C.A. says:

> "(d) Employer. The term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—
>
> "(1) *if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' (except for the purpose of subsection* (a)) *means the person having control of the payment of such wages.*"

Correspondence Between War Shipping Administration and Company Regarding Claim by Petitioner

Counsel devotes three pages, 45 to 47, inclusive, to a discussion of this. It is simple enough. Article 8 of the Service Agreement required the War Shipping Administration to provide or procure insurance against all possible claims and to include the General Agent along with itself as a co-insured. R. 156, 157. The *war* P. & I. risks the War Shipping Administration carried itself, as is evident from Lt. Cmdr. Evans' letter (R. 147, 148). The *marine* P. & I. risks were insured with commercial underwriters. The War Shipping Administration, in doing this, used the underwriters formerly and customarily used by the agents in pursuance of the governmental policy, as expressed in the House Report as follows:

> "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedores, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort." 1943 A.M.C. 614, 615.

The War Shipping Administration paid for all of this insurance. Consequently when Lt. Comdr. Evans determined, at least tentatively, that Hust's injury was not a war risk, but was an ordinary marine P. & I. risk, he quite naturally referred it to the agent, with instructions to take it up with its marine P. & I. underwriters from whom the government had bought the insurance. As the Oregon Court has pointed out, it was the agent's duty under the Service Agreement to adjust claims and to follow the instructions of the War Shipping Administration in doing so, and the correspondence on which counsel relies was merely a routine performance of that duty.

Counsel, in his brief at Page 45, says that the correspondence was not introduced as "an admission of liability", but rather to show "the practical construction" which the parties had placed on the Service Agreement. We think it shows a practical construction entirely in accord with our interpretation of that agreement.

In introducing, at the trial, the various items of so-called "evidence" discussed above, plaintiff's counsel was trying desperately to include something—anything at all—that would enable him to "get to the jury". But none of these, viewed in the light of the Service Agreement, the Statement of Policy and the Articles, is any evidence of employment at all. Each is plainly in accord with the functions of this respondent as a mere agent. We do not even have here a case of two equal inferences where "neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences against the other". Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 339. We do not, indeed, have any inferences at all. But if we did, they would have to give way before the plain, unambiguous documentary evidence of the Service Agreement, the Statement of Policy, and the Articles, signed by Hust himself. For as said in language quoted with approval by this Court in the Chamberlain case, supra: "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." 288 U.S. 341.

It is fortunate, we think, that these trifles may be eliminated. For it enables this Court to accomplish what we presume was its purpose in issuing the writ, namely, to decide for the country generally the

status of the seamen of the War Shipping Administration's fleet and the status of agents under the Administration's "Service Agreement".

NO PROOF OF RESPONDENT'S NEGLIGENCE

We have thus far discussed the question of employment; with especial reference to Hust's ineligibility to sue this respondent under the Jones Act. We come now to the second reason why the Oregon Court's judgment is correct, namely, there was no proof whatever of respondent's alleged negligence.

It will be conceded that the gravamen of actions under the Jones Act is negligence. *Seaboard Airline Ry. Co. v. Horton*, 233 U.S. 392, 501; and that the burden of proving this negligence is on the plaintiff. *Calmar Steamship Co. v. Taylor*, 92 Fed. (2d) 84, 86; *Cruse v. Sabine Transportation Co.*, 88 Fed. (2d) 298, 300; and that the evidence must be substantial; *Pennsylvania Ry. Co. v. Chamberlain*, supra, and *Chicago M. & St. P. R. Co. v. Coogan*, 271 U.S. 472, 478, and many *other cases in this Court.*

The only possible causes of the accident which the jury could have found were:

(a) A burnt out light bulb.

(b) Absence of the guard-chain around the hatch.

(c) Ordering plaintiff into the dark, unguarded place thus created.

All these things were responsibilities of the Master, "an agent and employee of the United States" who had "full control" over them. The defendant had nothing to do with them whatever. It did not own the ship or control it; or employ the crew, which was "subject only to the orders of the Master".

The bulb light was a part of the management of the ship—solely under the Captain's control. When it failed, another was immediately available. The ship was well supplied. There was merely a temporary failure in the *use* of its facilities; by the men responsible therefor—the Captain and his officers.

The same may be said of the guard-chain. It was removed by the Captain's own orders a day or two before the accident. R. 106. For some temporary use in connection with the towage. R. 83-84. Suitable rope was "readily" "available," which could have been placed on the stanchions around the hatch, as a substitute guard. R. 106. But the Captain did not have this done, until immediately after the accident, when he personally ordered it. R. 80.

As to the order to Hust to go into the hatch, certainly nothing need be said to show respondent's aloofness from it. "The officers and members of the crew shall be subject only to the orders of the Master." (Def's Ex. 21, R. at 151). And it is a fact that the order to Hust was given by the Boatswain in the presence and under the authority of the Master, R. 56.

No more need be said to show the complete lack of any evidence connecting respondent with the accident.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

Chicago M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.

CONCLUSION

In this case we have relied on two points: Non-employment, and no negligence. As to both, there can be only one conclusion. Where, as here, the evidence is "so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury". *Gunning v. Cooley*, 281 U.S. 90, 94. Many cases in this Court have held the same. The judgment of the Oregon Supreme Court is therefore manifestly correct.

Indeed, the clear and thoughtful reasoning of the Oregon Court's opinion is, in itself, a complete justification of the judgment. This brief is merely complementary thereto, and presented to give this Court whatever assistance lies in our power.

It is suggested at the close of Petitioner's Reply Brief (on the application for the writ) that "this corporation" is attempting to escape liability by vir-

tue of the "ambiguous terminology" of the Service Agreement. This is strange, when we remember that elsewhere counsel speak of the "careful draftsmen who prepared this agreement", (Brief, P. 34). No, the agreement is not ambiguous. Nor is "this corporation" evading any of its responsibilities. At the behest of the government in time of war, it assumed certain limited duties under an agency contract, prepared by the government, and left its compensation entirely to the discretion of the government. All it asks now is that its duties and responsibilities be determined in accordance with that agreement, and that there be not forced upon it a status and a responsibility which neither it nor anyone else, in or out of the government, ever intended, and which would be outside of its agency and unjustified by any of the evidence in the case.

Respectfully submitted,

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